Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1993

MARIA AVILES
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA WHICH DENIED ALLOWANCE OF APPEAL FROM THE EN BANC OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

Peter C. Bowers, Esquire
The Miller Building, Suite 201
441 North Fifth Street
Philadelphia, PA 19123
(215) 440-0300

123 pp

STATEMENT OF QUESTIONS PRESENTED

1. Where the police, pursuant to a search warrant, find drugs, money, and paraphernalia hidden in three metal strong boxes secreted in dresser drawers and under floorboards in two rooms of a home that are being sublet from the primary tenant, and where, at trial, the Commonwealth was unable to present any evidence to prove that this evidence was seized in an area of joint control and equal access, is the mere fact of the appellant's primary tenancy sufficient, as a matter of law, to establish the crime of possession with intent to deliver?

2. Have the Pennsylvania Courts impermissibly lowered the prosecution's burden of persuasion in constructive drug cases and made it possible to convict

parents, hotel managers, and rooming house owners of possession of controlled substances which have been concealed by a child, guest, or boarder in his or her bedroom even though the parent, manager or rooming house owner has no intent to exercise dominion and control over, or even knowledge of, the presence of these controlled substances.

3. Did not the Superior Court's utilization of a "more likely than not" standard to prove constructive possession, conflict with the requirement enunciated by this Court in **IN RE WINSHIP**, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970) that each element of the crime must be proved beyond a reasonable doubt?

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARIA AVILES
PETITIONER

V.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

MARIA AVILES, YOUR PETITIONER, RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE MARCH 9, 1994 ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING ALLOWANCE OF APPEAL FROM THE EN BANC OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA AFFIRMING THE CONVICTION IN THE TRIAL COURT.

OPINIONS BELOW

On March 9, 1994, the Supreme Court of Pennsylvania entered an Order denying Allowance of Appeal from the Superior Court of Pennsylvania to that Court. Such Order has not been officially reported as yet, but is reproduced in the Appendix , infra, at A-1. The Superior Court had previously filed two Opinions and one Order. The Opinion that underpins this Petition was a 5-4 en banc Opinion filed on October 22, 1992. That Opinion was officially reported as **COMMONWEALTH V. AVILES,** 419 Pa. Super. 345, 615 A2d 398 (1992) (en banc) and is reproduced in the Appendix, infra, at B-1. The unreported Order granting reargument en banc is set forth at C-1, and the Opinion of the three member Panel of the Superior Court, which reversed the conviction was

withdrawn but is set forth in the Appendix at D-1. The Opinion of the Honorable Ricardo C. Jackson, the trial Court, is set forth in the Appendix at E-1.

JURISDICTION

The Order of the Supreme Court of Pennsylvania denying Allowance of Appeal was entered on March 9, 1994. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

"Amendment XIV

Section 1... No state shall make or enforce any law which shall abridge the

privilege or immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law..."

CONCISE STATEMENT OF THE CASE

Perhaps in a scenario best suited to "Big Brother" in George Orwell's "1984", the five member majority of the en banc Pennsylvania Superior Court has now subjected a wide array of Pennsylvania residents to criminal liability for the conduct of others in circumstances where there is not one scintilla of evidence of guilty knowledge or intent to exercise dominion and control over controlled substances. In this case, the majority has held a landlord responsible for drugs found hidden in the bedroom of her tenant on a constructive possession theory.

Under the guise of the "realities of criminal law enforcement", the majority holding destroys the landlord's duty to allow a tenant the right of quiet enjoyment and now apparently requires the lessor to enter and search a tenant's property and possessions lest he or she be held accountable for the tenant's possession of contraband. Like the four member minority of the Superior Court, we urge this Court to accept review of this matter.

This case arose on January 23, 1989, when members of the Philadelphia Police Department executed a search warrant at 181 West Wishart Street in Philadelphia, Pennsylvania, at the home rented by the Petitioner, Maria Aviles, a single welfare mother of three (3) children. The individuals targeted in the search

warrant were Zoraida and Flea, her tenants, who were not home at the time of the search. The search revealed various controlled substances, paraphernalia and money secreted in three metal strongboxes, which were hidden in two (2) bedrooms on the second floor. There was unrebutted testimony that these rooms were sublet from the Petitioner by Zoraida and Flea, and the trial Court so found. Nevertheless, Ms. Aviles was charged with possession with intent to deliver a controlled substance, pursuant to 35 P.S. §780-113 (a)(30) and possession of drug paraphernalia, pursuant to 35 P.S. §780-113 (a)(32), as she was the primary tenant of the home and present at the time of the search.

On December 13, 1989, a non-jury trial commenced before the Honorable

Ricardo C. Jackson in the Phliladelphia Court of Common Pleas. At trial, the Commonwealth offered Police Officer Daniel McEwen. He testified that on Monday, January 23, 1989, at 7:30PM, he and other officers of the Philadelphia Police Department, executed a search warrant for the Wishart Street premises. Upon entering, he saw the defendant Maria Aviles, and she told the police that this was her home. Also inside the residence were three (3) Hispanic males, a seventeen (17) year old boy, and an "inordinate amount" of children. During the search of the second floor, a metal strongbox containing cocaine and grinders was found hidden in the back bedroom secreted in a dresser drawer; $10,538 was found hidden in a second metal strongbox secreted under a floor board in the

middle bedroom; and a third metal strongbox containing drug paraphernalia, including a scale and bags, were also found hidden in that same bedroom. No drugs were found in the front bedroom, inhabited by Petitioner, or anywhere else in the residence.

Officer McEwen further testified that on the day prior to the execution of the search warrant, he had received information about two (2) individuals, an Hispanic female known as "Zoraida" and an Hispanic male known as "Flea", who were alleged to possess the controlled substances at that address. Officer McEwen named these two (2) individuals on the search warrant as the owners/occupants of that residence. Officer McEwen also testified that prior to the execution of the search warrant,

he had conducted a surveillance on January 22 and 23, 1989 to confirm the information he received and had observed Hispanic males, carrying small items, enter the premises, stay a short while and leave. None of the information given to Officer McEwen by the informant or the Officer's own observations revealed the presence of Maria Aviles during the criminal conduct described in the warrant or even her knowledge of that conduct.

The defense presented significant, uncontradicted testimony that the rear and middle bedrooms had been sublet for the past five years by Ms. Aviles to Zoraida and Flea, her sister and brother-in-law to supplement her income for her and her three children from the Department of Public Welfare. See Majority Opinion at B-9 and n.3. That

testimony reflected they had been renting these two bedrooms from December, 1988 until the time of the search and that they occupied these rooms along with their children. The trial Court expressly accepted this testimony as reflected in its Opinion. See E-5

Notwithstanding the trial Court's further finding that Petitioner did not sleep in either of the rooms containing the contraband, and that the two person's wanted by the police were indeed tenants of the defendant, the Court found that "Maria Aviles was the lessee at the subject premises and she had access to all the bedrooms, none of which were locked. She permitted others to live in the house, and they happened to be her sister and brother-in-law. Ms. Aviles, therefore, must be presumed to be aware

of the activities engaged in by her relatives/tenants when various males would visit the home for brief periods of time to make transactions." Trial Court Opinion at E-6.

After revoking bail on that date, bail was later reinstated eight (8) days later. Timely post-trial motions were challenging the sufficiency of the evidence were filed and denied. See Opinion at E1-E4. On May 10, 1990 the Court sentenced Ms. Aviles to not less than four (4) years nor more than eight (8) years on the charge of possession with the intent to distribute a controlled substance and a concurrent term of not less than six (6) months nor more than one (1) year on the charge of possession of paraphernalia. Both sentences were stayed pending appeal.

However, the Court Administrator of the Philadelphia Court of Common Pleas just recently ordered that the sentence be executed commencing June 23, 1994.

On Appeal, a three Judge Panel of the Superior Court reversed and discharged the defendant. Judge Wieand, writing for the majority, held that this evidence was insufficient to prove beyond a reasonable doubt that Ms. Aviles constructively possessed the controlled substances in the bedrooms she did not occupy. President Judge Rowley joined in this Opinion, and Judge Cavanaugh dissented without Opinion. See D-1, et seq.

The Commonwealth sought en banc reargument premised primarily on the fact that the Panel majority had relied on the uncontradicted defense testimony which

was accepted by the trial Court in its Opinion. This request for reargument was granted, and a sharply divided Superior Court affirmed the trial Court in a 5-4 decision, although the issue upon which relief was sought - the use of defense evidence - was not adjudicated. The Majority held that Petitioner constructively possessed the drug despite the lack of knowledge or intent to possess those substances and also found possession based upon a "more likely than not" standard. See B20-B21.

Petitioner then sought Allowance of Appeal in the Supreme Court of Pennsylvania challenging both the sufficiency of the evidence and the Majority's use of a more-likely-than-not standard to conclude that the evidence was sufficient to prove constructive

possession. That Court deliberated for 16 months before denying Allowance of Appeal on March 9, 1994.

CONCISE STATEMENT OF REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The Petitioner's concerns in this matter are essentially three-fold:

> (1) Has the decision of the Pennsylvania Court unnecessarily expanded the parameters of the constructive possession doctrine to allow convictions of innocent persons based upon evidence insufficient to prove any nexus between the person and the controlled substance;
>
> (2) Has the Pennsylvania Superior Courts decision impermissibly relieved the Commonwealth of its burden of proving knowledge and intent in constructive possession cases; and
>
> (3) Was the Pennsylvania Superior Court's application of a "more likely than not" burden of persuasion in constructive possession cases in derogation of jurisprudence of this Court requiring proof of every element of the crime beyond a reasonable doubt.

Perhaps the primary concern in this brief is that the parameters of the constructive possession doctrine have simply been stretched too far, and in particular the Superior Court failed to require proof of every element of the offense beyond a reasonable doubt. As Judge Wieand, writing for the dissent, so poignantly stated:

> "A majority of this Court, by its holding in this case, has made it possible to convict parents and rooming house owners of possession of controlled substances which have been concealed by a child or roomer in his or her bedroom even though the parent or owner has no knowledge of the presence of the controlled substance." Dissenting en banc Superior Court Opinion at B-25.

However, Judge Wieand has not gone far enough. The majority Opinion now applies with equal force to shopkeepers, and businesspersons in shared office space arrangements whose employees and occupants have secreted controlled

substances in their desks or possessions and in office areas to which the shopkeepers or businesspersons generally have joint control and equal access, even though those individuals neither possess the requisite knowledge or intent to exercise dominion and control over the contraband.

The Supreme Court of Pennsylvania recently set forth the standard for proving constructive possession in **COMMONWEALTH V. VALETTE,** 531 Pa.484, 613 A2d 548 (1992):

> In drug possession cases, the Commonwealth must prove that a defendant had knowing or intentional possession of a controlled substance, and if the substance is not found on the defendant's person, then the Commonwealth must satisfy that burden by proof of "constructive possession."
>
> This Court has defined constructive possession as "the ability to exercise a conscious dominion over the illegal substance: the power to control the contraband and the intent to

exercise that control." **COMMONWEALTH V. MACOLINO**, 503 Pa. 201, 206, 469 A2d 132, 134 (1983). Constructive possession may be found in one or more actors where the item in issue is in an area of joint control and equal access. **COMMONWEALTH V. MURDRICK**, 510 Pa. 305, 507 A2d 1212 (1986). Id. at ____, 613 A2d at 549-550.

Here, the drugs in question were found in the bedrooms rented to, and controlled by, Zoraida and Flea. The Superior Court Majority and the trial Court presumed that Petitioner had access to those bedrooms essentially, because neither Ms. Aviles nor her witnesses testified she was denied access thereto. See Opinion at A. This argument ignores the landlord/tenant relationship as it exists in Pennsylvania and the tenant's right of quiet enjoyment to leased space, as well as the expectation of privacy presumed in an individual's bedroom. See **2401 PENNSYLVANIA AVENUE CORPORATION V.**

FEDERATION OF JEWISH AGENICES OF GREATER PHILADELPHIA, 507 Pa. 166, 489 A2d 733 (1985); **DONZE V. DEVLIN**, 329 Pa. 1, 195 A. 882 (1938). Moreover, this holding impermissibly places the burden of proving the denial of access on the Petitioner.

The Superior Court majority also applied a "more likely than not" burden of persuasion to prove constructive possession. As the Majority opinion states:

> " In evaluating proof of joint constructive possession, one must be cognizant of the 'realities' of criminal law enforcement and the 'totality of circumstances' before one may be allowed to 'infer' from a set of facts that possession of contraband 'was more likely than not' properly assignable to a defendant." Opinion at B20 - B21. (emphasis added)

However, use of such a standard clearly contravenes the holding of this Court that the Due Process Clause

requires that each and every element of the offense must be proved beyond a reasonable doubt and, correspondingly, further mandates that the burden of disproving an element of the offense never be placed squarely on the defendant's shoulders. **IN RE WINDSHIP**, 397 U.S. 358, 364, 25 L.Ed. 2d 368, 375, 90 S.Ct. 1068 (1970). The Majority Opinion clearly relied on this typical civil standard in rendering its Opinion. See Majority Opinion at B20 - B23. The affirmance of the trial Court by relying on a civil standard is inimical to our system of criminal justice and makes a mockery of the presumption of innocence.

The **WINSHIP** opinion most graphically expressed the importance of the beyond a reasonable doubt standard in our system of criminal justice. While a virtual

assumption of federal and state Courts for nearly two hundred years, the **WINSHIP** Court stated in no uncertain terms that that standard is "'the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.'" Id. at 361, 25 L.Ed. 2d 368, 90 S.Ct. 1068 citing **C.MCCORMICK, EVIDENCE** §321, pp. 681-682 (1954). Moreover,

> The standard provides concrete substance for the presumption of innocence,--that bedrock "axiomatic and elementary" principle whose" enforcement lies at the foundation of the administration of our criminal law"... As the dissenters in the New York Court of Appeals observed, and we agree," a person accused of a crime... would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."

****

Lest there remain any doubt about the constitutional nature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 363-64, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (citations omitted)

Accordingly, this Court rejected the use of the preponderance of evidence/ more likely-than-not standard, even in juvenile criminal cases. As the **WINSHIP** Court's Opinion makes crystal clear, the reasonable doubt standard ensures against unjust convictions and reduces the risk of factual error in a criminal proceeding. See also concurring Opinion of Justice Harlan, Id. at 372, 25 L.Ed. 2d 368, 90 S.Ct. 1068.

Attempted inroads into this standard in criminal cases have been rejected by

this Court in **MULLANEY V. WILBUR**, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975) and **JACKSON V. VIRGINIA**, 443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979) and in all this Court's subsequent cases. In **MULLANEY V. WILBUR**, this Court, in a unanimous opinion, rejected the Maine rule requiring a defendant charged with murder to prove by a preponderance of the evidence that he acted in the heat of passion to reduce the level of homicide from murder to manslaughter. The Court held that the use of this rule violated the requirement under the Due Process Clause, that the prosecution must prove every fact necessary to convict beyond a reasonable doubt. That case also requires that the burden of disproving a requisite element of an offense not be placed on the defendant.

In **CARELLA V. CALIFORNIA,** 491 U.S. 263, 105 L.Ed. 2d 218, 109 S.Ct. 2419 (1989), this Court reversed a conviction where jury instructions were utilized which unconstitutionally imposed conclusive presumptions as to crucial elements of Carella's crimes. The California Appellate Department, nevertheless, validated the presumptions because Carella, like Maria Aviles, never offered testimony concerning the nonexistence of the presumed facts. Because the "disposition was so plainly at odds with prior decisions of this Court," that decision was reversed Per Curiam. This case demonstrates that the Majority's use of the fact that the Petitioner presented no evidence denying access to the sublet rooms was also improper.

In **JACKSON V. VIRGINIA**, the Court recognized that the issue of evidentiary sufficiency is a federal question and on habeas corpus review a federal court, rather than restricting its inquiry merely to whether there is "any evidence" to support the conviction, must consider whether there is sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt.

The facts of the matter at bar demonstrate the reasoning behind this Court's concern that the watering down of the burden of persuasion would eviscerate the presumption of innocence, heighten the risk of factual errors in criminal proceedings, risk an unjust conviction, and leaces people in doubt whether an innocent person has been convicted. Indeed, the 2-1 Panel vote to

reverse the conviction and the 5-4 en banc decision affirming the conviction clearly demonstrates the level of that doubt.

Here, the watering down of the standard allowed the Majority to conclude that merely because the trial Court had found that Ms. Aviles leased the entire premises; had "access" to the rooms where the drugs, paraphernalia and money were found; and resided in a premises where reported drug activity by Zoraida, Flea and others occurred (none of which involved Petitioner), she had, in fact, entered the rooms where the contraband was found with the intent to establish dominion and control over it. In doing so, the decision of the Pennsylvania Courts have stretched the doctrine of constructive possession too far, given

the lack of evidence in this case.

The conviction rests entirely on evidence obtained during the course of the search of this premises and is woefully inadequate to prove guilt in this case. Accordingly, this insufficiency of the evidence is the final aspect sought to be reviewed.

See **JACKSON V. VIRGINIA, supra.**

The evidence reflects that Petitioner was a poor welfare mother of three who was constrained to rent out two-thirds of the bedrooms of her home to make ends meet. It was only in those rooms, where the contraband was found. There was no evidence to establish that Petitioner slept in, stored property in, or otherwise shared access to those two rooms. There is no evidentiary source-neither in the testimony of the officers

nor even in the informant's observations or anywhere in the search - warrant which proves that Petitioner had either knowledge or intent to control, and thus constructively possessed, this contraband. The evidence, at best, demonstrates mere family association and/or mere presence in the residence.

Pennsylvania case law previously did not allow convictions on this questionable basis. Pennsylvania Courts have recognized that the bedroom, and the dresser within it is a very private place with limited access and virtually always subject to the exclusive control of the possessor of the room. See e.g., **COMMONWEALTH V. MAURER**, 240 Pa. Super. 471, 361 A2d 356 (1976) and **COMMONWEALTH V. DECAMPLI**, 243 Pa. Super. 69, 364 A2d 445 (1976). In **MACOLINO, supra,** the

Supreme Court held that where drugs were seized from a marital bedroom, an area of equal access and joint control, a husband and wife could both be convicted of constructive possession. In **MUDRICK, supra,** constructive possession was established where drugs were found in the bedroom where the defendant slept and were in plain view in common areas in the residence. By contrast, in **VALETTE**, drugs were not in visible possession but were found in concealed areas, as in the case at bar. No drugs were found on **VALETTE** or in the room where he was sitting at the time of police entry. The Commonwealth only proved mere presence and mere association, which the Pennsylvania Supreme Court held to be insufficient. Except for the fact that Maria Aviles inhabited the premises in question, these

cases are factually indistinguishable, and the Superior Court's reliance on mere presence is inappropriate under **VALETTE, MUDRICK**, **MACOLINO**, **MAURER**, and **DECAMPLI**.

Moreover, "where others have equal access to the contraband, evidence of defendant's mere opportunity to control the contraband is insufficient to sustain a conviction [for] its possession. " **COMMONWEALTH V. BANAHASKY**, 250 Pa. Super. 495, 499, 378 A2d 1257, 1259 (1977); see also **COMMONWEALTH V. KEBLITIS**, 500 Pa. 321, 324, 456 A2d 149, 151 (1983) (requiring evidence of participation in the crime and noting that mere presence in an area equally accessible to others is insufficient to support a conviction); **COMMONWEALTH V. CHENET**, 473 Pa. 181, 184-185, 373 A2d 1107, 1108-1109 (1977) (same). Since there was absolutely no

evidence of Petitioner's knowing and/or intentional control over the drugs seized here, this line of cases further undercuts the rationale underlying the Opinion of the Superior Court Majority.

Federal law also demonstrates the utter lack of evidentiary sufficiency. In **UNITED STATES V. BROWN**, 3 F.3rd 673 (3rd Cir. 1993), that conviction, as did the conviction here, rested entirely on evidence seized during the search of Brown's home pursuant to a warrant.

During the search, the police seized large quantities of cocaine powder, cocaine base, and heroin, as well as assorted drug paraphernalia. As the search was progressing, co-defendant, Ama Baltimore, arrived at the house in a taxi, used a key to enter the premises, acknowledged to the police that a pair of

shorts seized from an upstairs sewing room was hers, and told the police that they could not arrest her for possessing a switchblade knife because she was in her own home.

The heroin was found in a kitchen refrigerator, the cocaine powder was found in a box in the kitchen closet and also in a rear bedroom, and the cocaine base and paraphernalia were also found in that bedroom. No drugs were found in the sewing room, and there was no evidence connecting defendant Baltimore to the rear bedroom or the drugs in the kitchen. The Third Circuit held that while the evidence may have been sufficient to demonstrate that Baltimore was residing at the Brown home and that she knew that drugs were in the house, the evidence was "not sufficient to support a finding that

she exercised dominion and control over the drugs." 3 F. 3rd at 684 (emphasis added)

The **BROWN** Court also relied upon the decisions in **UNITED STATES V. VASQUEZ-CAIN**, 978 F.2d 546 (9th Cir 1992) and **UNITED STATES V. ZIEGLER**, 994 F.2d 845 (D.C. Cir. 1993). In **VASQUEZ-CAIN**, the Court reviewed the drug possession and drug conspiracy convictions of a housekeeper and a house guest who were present and residing in a home where large quantities of drugs were found. The housekeeper admitted knowing of the large quantity of drugs, was present during a drug delivery, carried a false passport, and her name appeared on an electric bill for the residence. The house guest knew the cocaine was present, actually slept in the room where drugs

were found, and her fingerprints were found on six containers. However, there was evidence that there were others who were in actual possession of the drugs. The Court noted that the defendants' mere knowledge of, and proximity to, the drugs was insufficient, and the evidence failed to support an inference that either defendant "had the power to exercise dominion and control over the narcotics." 978 F.2d at 550. Moreover, the evidence was consistent with that of the conduct of innocent persons with no stake in the drug activities taking place in the residence. Id. at 551.

In **ZIEGLER**, the defendant was arrested in the bedroom of a large apartment owned by her boyfriend during a search of the apartment where various contraband including crack cocaine, was

found. However, and most significant to this case, she was not found in the room where crack cocaine was found nor was there any evidence linking her to it. In reversing her conviction for possession with intent to distribute crack cocaine, the D.C. Circuit held that the evidence was not sufficient to show that Ziegler knew of the crack. The Court further held:

> "But mere proximity or accessibility to contraband will not support a conclusion that an individual had knowing dominion and control." 994 F.2d at 848.

All of the these cases, as well as the Pennsylvania cases cited above require either dominion and control or something akin thereto in order to prove constructive possession. The Commonwealth's case was woefully lacking in that regard, and even viewing the

evidence in a light most favorable to the Commonwealth, no rational trier of fact could have found the essential element of constructive possession beyond a reasonable doubt. **JACKSON V. VIRGINIA, supra.** The Superior Court's Opinion is unprecedented under Pennsylvania jurisprudence, see dissenting Superior Court Opinion at B-43, cited above. It is also in direct conflict with the federal case law cited above, where the evidence was arguably much more sufficient. Additionally, **WINSHIP** and its progeny, require that the Commonwealth has the burden of proving every fact required beyond a reasonable doubt and never loses that burden. However, the Superior Court Majority Opinion has contravened those time-honored principles.

Because of these multiple conflicts

and because the federal questions presented herein have been decided in a manner that conflict with the applicable decisions of this Court review over this matter should be exercised.

CONCLUSION

For all the foregoing reasons, it is requested that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

Peter Bowers, Esquire

IN THE SUPREME COURT OF PENNSYVLANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA RESPONDENT	: NO. : 786 E.D. : ALLOC. : DKT. 1992
v.	: PETITION : FOR : ALLOWANCE
MARIA AVILES PETITIONER	: OF APPEAL : FROM ORDER : OF THE : SUPERIOR : COURT

O R D E R

PER CURIAM

AND NOW, this 9th day of March, 1994, the Petition for Allowance of Appeal is denied. The Application for Leave to File a Supplement to the Petition for Allowance of Appeal is granted.

Mr. Justice Montemuro did not pariticipate in the consideration or decision of this matter.

Mr. Justice Frank J. Montemuro is sitting by designation as Senior

Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavialability of Mr. Justice Rolf Larsen, see No. 127 Judicial Adminsitration Docket No. 1, filed October 28, 1993.

COMMONWEALTH OF PENNSYLVANIA	:	**IN THE**
	:	**SUPERIOR**
Appellee	:	**COURT OF**
	:	**PA**
V.	:	
	:	
MARIA AVILES	:	**No. 01650**
Appellant	:	**Philadelphia**
	:	**1990**

Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County, Criminal Division at NO. 89-02-1032-1033

BEFORE: ROWLEY P.J., WIEAND, CIRILLO, OLSZEWSKI, MONTEMURO, POPOVICH, JOHNSON, HUDOCK and FORD ELLIOT, JJ.

OPINION BY POPOVICH, J.:

This case has been granted en banc consideration to assess a challenge to the judgement of sentence imposed following a bench trial and conviction for various drug offenses. We affirm.

The sole issue concerns the sufficiency of the evidence to sustain Maria Aviles' convictions. To assess such a chain, one looks to a time-honored

test oft-stated in this jurisdiction; to wit:

> ...in determining if the evidence was sufficient to sustain the conviction, the test is, whether accepting as true all of the evidence (be it direct or circumstantial) and all reasonable inferences arising therefrom, upon which the jury, or the trial court in a non-jury trial, could properly have reached its verdict, is it sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime of which [s/] he has been convicted.

COMMONWEALTH V. WRONA, 442 Pa. 201, 204, 275 A.2d 78, 79-80 (1971). Accord **COMMONWEALTH V. MACALINO**, 503 Pa. 201, 469 A.2d 132 (1983); **COMMONWEALTH V. THORNTON**, 494 Pa. 164, 430 A.2d 1168 (1981); **COMMONWEALTH V. DAVIS**, 491 Pa. 363, 421 A.2d 179 (1980); **COMMONWEALTH V. HELM**, 485 Pa. 315, 402 A.2d 500 (1979); **COMMONWEALTH V. WILLIAMS**, 447 Pa. 206, 290 A.2d 111 (1972); **COMMONWEALTH V. KIRKLAND**, 413 Pa. 48, 195 A.2d 338

(1963). Of course, the record in the instant appeal must be considered and read in the light most favorable to the Commonwealth. E.G., **COMMONWEALTH V. RANKIN, 441 Pa. 401, 272 A.2d 886 (1971).**

So viewed, the evidence reveals that at 7:30 p.m. on the 23rd of January, 1989, Police Officer Daniel McEwen, in the company of five other officers, arrived at 181 West Wishart strength of a first-time informant's account of drug activity and follow-up surveillances by Officer McEwen.[1]

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[1]In particular, the probable cause section of the warrant provided that, between 1:30 p.m. and 2:30 p.m. on Sunday, the 22nd of January, 2989, the informant was inside the Wishart Street residence in the company of two "occupants" identified as "Zoraida" and "Flea". The two "r[a]n a cut house" in which:

> ... they obtain [ed] large amounts of Cocaine in bulk form, from drug dealer,s and they then cut and package[d] these drugs into smaller packets, thus preparing the drugs for street sale, all in various

amounts/weights. The Informant kn[e]w this to be true because during the aforementioned dt. and time, the Informant did observe on 2 separate occasions, unknown hispanic males enter [] this location and hand[] bulk amounts of COCAINE to the above mentioned persons, those persons then on each occasions [sic] telling the unknown hispanic males, "We can't cut this until tonight, you can come for it around 10:00 tomorrow night, we're backed up". During this period the Informant did observe these aforementioned persons retrieve from a gray tool box, a large square brick of compressed white powder, (COCAINE), and cut this into smaller pieces, weighing and packaging each piece individually on a kitchen table.

Because of the Information received, Officer McEwen conducted a surveillance of the Wishart Street address on the following dates and times , all of which were included in the probable section of the warrant which read:

On 1-22-89 at 5:25 P.M., the Affiant did conduct a surveillance from a vantage point of 181 Wishart Street., this period, the Affiant observed on 2 separate occasions [sic], vehicles drive to this location and different unknown hispanic males did enter this location carrying small packages and left after only a few seconds without those packages.

Once at the site, Officer McEwen knocked on the front door and announced, "Police". Ms. Aviles opened the door and was informed that the police were

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> On 1-22-89 between 8:45 P.M. and 9:10 P.M., the Affiant did again return to this location and did conduct a second surveillance of location and observed on 1 occasion [sic] an unknown hispanic male walk to the front door, knock and was let in while carrying a small package and left without this package after only a few seconds.
>
> One 1-22-89 between 11:00 P.M., the Affiant conducted a surveillance of location yielding no activity observed.
>
> On 1-23-89 between 4:10 P.M. and 4:30 P.M., the Affiant conducted a surveillance of location and observed on 2 separate occassions [sic], unknown hispanic males drive to the front of this location and appeared to dropp [sic] off small items wrapped in green plastic trash type material on each occassion [sic], each only staying inside for a few seconds.

This search warrant was admitted into evidence without objection. See Trial Court Opinion at 4.

requesting entry into the house. Consent was given. All those present were advised to remain calm and that the police had a search warrant. At this time, Ms. Aviles addressed Officer McEwen: "She said don't talk to anyone else, talk to me. This is my place."

A team of officers conducted a search of the premises. Within 10 minutes of their arrival, Officer McEwen was called to the second floor, rear bedroom and Officer Tames pointed to an open dresser drawer containing a brown metal box. The box was found to contain:

a) 54 plastic packets, each containing a white powder and sealed with gold tape;
b) 3 different sized sandwich baggies containing a white powder;
c) 7 clear plastic packets sealed with orange tape;
d) a small glass bottle containing a white powder; and
e) 3 black and green grinders and a screen, all of which

contained a white residue. [2]

Officer Tames stated that the door to the rear bedroom was open and he "did not break any lock". With regard to the metal box, Officer Tames testified:

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[2]More particularly, Officer McEwen testified that he inventoried:

a) Ziplock bags containing 199 grams of chunky white powder (cocaine).
b) Clear plastic ziplock bag containing 112.1 grams of cocaine;
c) Small white bag containing 35.1 grams of cocaine;
d) 54 pink plastic packets containing white powder;
e) 8 packets, 3 of which were field tested for cocaine; net weight: 175, 168, 119, 146, 163 132, 85 & 142 milligrams; respectively;
f) 1 ziplock bag containing 7 sealed plastic packets of white powder -- 2 packets selected at random contained cocaine and weighed 197 & 279 milligrams, respectively;
g) 3 black and green plastic grinder, each with a residue of white powder (cocaine); and
h) 1 clear glass jar containing 5.97 grams of a chunky white substance which was not controlled.

> .... when I got the box out of the drawer.... it was closed and I just pulled this [latch] up like that and opened it. *** I didn't pry it open. I just opened it.

Then, Officer McEwen proceeded to the second bedroom, which was the middle bedroom on the same floor. There McEwen observed Sergeant Perez "on his hands and knees removing floor boards... from the eastern-most wall of the room." Retrieved from under the floor was an "open toolbox" containing $10,538 in cash. McEwen also found a second box in the middle bedroom which contained:

a) 1 scale with 5 weights marked 50, 20, 20, 10 & 5 grams;
b) Electronic heat-sealer (10" x 10") with a plug;
c) 2 strainers (10" & 5" in diameter);
d) Screen;
e) Hundreds of empty, clear plastic packets; and
f) 12 rolls of gold tape.

Sergeant Perez was the first officer to enter the middle bedroom, and, in respect

thereto, he stated that he did not have to force the door open to get in: "The door [he] went into, to get into the room, [he] didn't break."

The police found proof that Aviles resided at the stated address. Likewise, Ms. Aviles admitted being the leassee and that, for approximately 5 years prior to the search, she had rented the rear and middle bedrooms for $35 a week to supplement her receipt of $474 a month from the Department of Public Welfare.[3]

Ms. Aviles testified that the rear and middle bedrooms had been rented to her sister (Zoraida) and brother-in-law

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[3]Ms. Aviles testified that she rented the rowhouse in question (which is no more than 16 feet in width) for $175 a month and paid $75 for electricity; $27 for gas; and $100 a month for heating oil. Her family's living expense came to $375, an amount which had to be off-set by the receipt of $237 every two weeks from the Department of Public Welfare and the rent ($35) for the 2 bedrooms.

(nicknamed "Flea") from the beginning of December, 1988 until the police arrived.[4]

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[4]Interestingly, on February 1, 1989, Aviles' counsel had photographs taken of the premises. All were of the rooms searched by the police on January 23, 1989, and depicted the disheveled condition in which the bedrooms and hallway were left, allegedly, by the police: clothing thrown willy-nilly and the second floor hallway was littered with clothing and other debris. All of this, supposedly, remained intact for 10 days <u>after</u> the search <u>and following</u>, according to Aviles' son (Jorge), "Zoraida and Flea's" flight from the premises on the evening following the police's search -- "They picked up the children and they picked up their clothes and they left.... and [Jorge] ha[s]n't seen them no more." Yet, those same two bedrooms still appeared to be cluttered with clothing and other personal belongings of Zoraida and "Flea" well after they exited the premises on the heels of the police search.

Further, neither Ms. Aviles nor any of her witnesses (son and sister, Gladys) knew the number of children in Zoraida's family (Jorge said: 5;1 Ms. Aviles said: 4). And, during the entire time that Zoraida, "Flea" and the children lived in Aviles' home, Gladys indicated that <u>no one told her</u> Zoraida was in town.

Also, it needs to be mentioned that a private detective was hired by Aviles' counsel to take photographs of the

She denied having any knowledge of the drugs, the location of the drug paraphernalia or the sawed-out floor-compartment wherein the money was hidden.

It was Jorge's belief that the sawed-out floor-boards in the middle bedroom had been perpetrated by the police during their search since, he claimed, no such opening existed prior thereto. This was confirmed by Aviles's sister (Gladys), who rented the same two bedrooms from 1987 until 1988 and noticed no floor boards having been sawed through and used as a storage area. On the other hand, the police testified to the contrary: McEwen "didn't observe any

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condition of the bedrooms after the search. However, no effort was made to produce "Zoraida". All that was achieved was a "stipulation" by counsel that the defense attorney had spoken to a "Zoraida". This was done, purportedly, to establish that Maria Aviles and "Zoraida" were not one and the same person.

sawdust or fresh type markings [in the floor boards]. They appeared to be well worn [,i.e., he] wouldn't say it was recently cut."

Lastly, Aviles testified that locks were placed on the doors to the rear and middle bedrooms by her sister immediately upon renting the rooms; she denied having any keys to the locks; she denied selling drugs; and she did not know about the metal boxes or the hole in the floor in the middle bedroom or its contents. The trial court, after hearing from both sides, found Ms. Aviles guilty as charged and revoked her bail.[5]

Post-trial motions were filed, denied and sentence was imposed. On an initial appeal to this Court, a panel

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[5]Thereafter, bail was reinstated in the amount of $100,000.00 pending appeal. A property bond was posed by friends of Ms. Aviles.

majority (with Cavanaugh, J. dissenting) reversed the judgement of sentence and discharged Ms. Aviles. However, on petition of the Commonwealth, this Court granted en banc certification to determine whether the Commonwealth established, beyond a reasonable doubt, Aviles' guilt for knowingly or intentionally possessing a controlled substance, possession with intent to manufacture or deliver a controlled substance and possession of drug paraphernalia. See 35 P.S. §780-113(16), (30) & (32) (Supp. 1992).

The standard of review having been articulated earlier, it will not be repeated here, except we add to the appellate-review-equation the reliance upon "constructive possession" as a vehicle by which to prove Ms. Aviles' knowing or intentional possession of

cocaine and drug paraphernalia. **COMMONWEALTH V. MUDRICK, 510 Pa. 305, 507 A.2d 1212 (1986).** Since, the cocaine and drug paraphernalia were not found on Ms Aviles' person, she was properly convicted only if the Commonwealth proved joint constructive possession. See **COMMONWEALTH V. GRIFFIN, 230 Pa. Super. 425, 326 A.2d 554 (1974).**

Our Supreme Court has stated on this subject that:

> Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement; Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as "conscious dominion." **COMMONWEALTH V. DAVIS,444 Pa. 11, 115, 280 A.2d 119, 121 (1971).** We subsequently defined "conscious dominion" as "the power to exercise that control" **COMMONWEALTH V. MACOLINO, 503 Pa. 201, 206, 468 A.2d 132, 134 (1983).** Though these tests may be

helpful and logical in the abstract, application to actual factual situation, particularly when multiple actors are involved, has proven difficult for our courts in cases involving controlled substances located on premises in joint possession but not on the actual person of any premises.

To aid application, we have held that constructive possession may be established by the totality of the circumstances. **COMMONWEALTH V. FORTUNE, 456 Pa. 365, 318 A.2d 327 (1974).** We took a further step toward resolving these problems in **COMMONWEALTH V. MACOLINO, supra.** In **MACOLINO**, contraband and otherwise legal items used in the drug trade were found in the common bedroom of the Macolinos, a married couple. We held that "constructive possession can be found in one defendant when both the husband and wife had equal access to an area where the illegal substance or contraband is found." 503 Pa. at 208, 469 A.2d at 135. See also **COMMONWEALTH V. CARROLL, [510] Pa. [299], 507 A.2d 819 (1986).**

...We hold today that even absent a marital relationship

> constructive possession may be found in either of both actors if contraband is found in an area of joint control and equal access. *** [In] the MACOLINO analysis [,] shared access to and control of the area where the contraband was found was critical.

MUDRICK, supra, 510 Pa. ___, 507 A.2d at 1213-14 (Emphasis added). Accord COMMONWEALTH V. GREKIS, ___Pa. ___, 601 A.2D 1275 (1992); COMMONWEALTH V. PARSONS, 391 Pa. Super. 273, 570 A.2d 1328 (1990); COMMONWEALTH V. SANTIESTEBAN, 381 Pa. Super. 18, 552 A.2d 1072 (1988); COMMONWEALTH V. DAVIS, 331 Pa. Super. 285, 480 A.2d 1035 (1984).

The trial court concluded, in denying post-trial motions, that "Maria Aviles was the lessee at the subject premises and has had access to all the bedrooms, none of which were locked." Trial Court Opinion at 3. The evidence is consistent with such conclusions.

Specifically, Ms. Aviles admitted that she was the lessee at 812 West Wishart, that she had sub-leased 2 of the 3 upstairs bedrooms for the past 5 years for a fixed dollar amount, and that the most recent sub-lessees were her sister and brother-in-law.

The trial court also concluded that Ms. Aviles had "access to all the bedrooms". In none of the testimony reviewed by this Court was there a reference by either Ms. Aviles or her witnesses that she was denied access to the rear and middle bedrooms. Albeit Ms. Aviles stated that her sister and brother-in-law affixed "locks" to the rented bedrooms, and Aviles' son testified that there were "locks" on the two rooms thereafter, the account of the

officers was to the contrary.[6] This created a disputed issue of fact.

Since the trial court, as the trier-of-fact, had the prerogative to believe all, some or none of the testimony proffered, the verdict rendered in this case reflects the trial court's acceptance of the officers' version of the physical condition of the residence and the 2 bedrooms housing Zoraida, "Flea" and their children. Accordingly, such determinations, being buttressed by the records, we are not at liberty to usurp the trial court's roles as credibility-assessor and arbiter-of-fact or substitute our (different) conclusions on matters within its bailiwick. Contrast **HELMS**, supra.

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[6]Sergeant Perez and Officer Tames repeatedly denied having used force to enter the rear and middle bedrooms; each testified that the doors were open upon their arrival and contained no locks.

Continuing, the principles enunciated in **MUDRICK**, supra, are equally applicable to aid us in determining whether joint constructive possession (power to control and intent to control has been proven by the Commonwealth.

Initially, we set forth some guideposts to assist us in our endeavor. First, in constructive possession cases involving drugs, all facts and circumstances surrounding the possession of drugs are relevant in determining whether contraband was possessed with the requisite intent to deliver or manufacture. See **DAVIS**, supra. Second, in conjunction with the quantity of drugs possessed, the courts have considered the presence of paraphernalia used in the narcotics trade as well as the presence of inordinately large sums of cash in ferreting out of the element of intent.

See **HELMS**, supra, citing **COMMONWEALTH V. FISHER**, 315 Pa. Super 311, 462 A.2d 1366 (1983); **COMMONWEALTH V. BUNDRIGE**, 303 Pa. Super. 267, 449 A.2D 681 (1982); **COMMONWEALTH V. SMITH**, 250 Pa. Super. 460, 378 A.2d 1239 (1977). Finally, albeit not dispositive, a defendant's presence at the location where drugs are discovered is a factor in establishing knowledge that contraband is present and his/her exercise of dominion and control over the same. See **PARSONS**, supra, citing **COMMONWEALTH V. HARRIS**, 263 Pa. Super. 110, 397 A.2d 424 (1979.)

In evaluating proof of joint constructive possession, one must be cognizant of the "realities" of criminal law enforcement and the "totality of circumstances before one may be allowed to "infer" from a set of facts that possession of contraband "was more likely

than not" properly assignable to a defendant.

Instantly, viewing the evidence in a light most favorable to the verdict-winner, we find it reasonable to conclude that Ms. Aviles was the lessee of the premises in which a large amount of cash, drugs and drug paraphernalia were found; the day preceding the search, an informant had witnessed the receipt of large quantities of cocaine from drug dealers on two separate occasion at Aviles' residence; on the same day, the informant heard Aviles' sister and brother-in-law advise suppliers that because they were "backed up"; the informant witnessed a brick of cocaine being cut, weighed and individually packaged "on [the] kitchen table"; no more than an hour-and-a-half after informant's viewing and communication of

the same to the police, a surveillance of the premises disclosed 3 occasions in which unknown Hispanic males walked into the premises in question with small packages and exited within a "few seconds without those packages'; a surveillance of the premises 3 hours prior to the warranted search produced 2 additional observations of similar activity as that which transpired the day before; Ms. Aviles was on the premises when the search was conducted; and, the 2 second floor bedrooms in which money, drugs, and drug paraphernalia were found were situated next to Ms. Aviles' sleeping quarters and were accessible to anyone wishing to enter while in the residence.

From the evidence presented to the factfinder, when viewed under the totality of the circumstances and drawing all reasonable inferences therefrom

bounded only by the "realities" of drug activity and its attendant variables, we find that Ms. Aviles had joint control over and equal access to areas where cocaine, drug paraphernalia and money were found -- the rear and middle bedrooms.

The factfinder could properly find that Ms. Aviles, and her sub-lessees not only had control and access to all the bedrooms but the whole residence. Thus, analyzing all the circumstances, the trial court could infer Ms. Aviles' constructive possession of the cocaine, drug paraphernalia and money which were openly accessible to her in the rear and middle bedrooms.

We find the evidence, and the reasonable inferences to be drawn therefrom, to be supportive of the verdicts. Therefore, we affirm the

judgment of sentence issued by the Philadelphia County Court of Common Pleas.

COMMONWEALTH OF PENNSYLVANIA	: IN THE :SUPERIOR : COURT OF
V.	: PA : NO. 1650
MARIA AVILES, APPELLANT	: PHL 1990 :

APPEAL FROM JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CRIMINAL DIVISION, OF PHILADELPHIA COUNTY, NOS. 89-02-1032-1033.

BEFORE: ROWLEY, P.J., WIEAND, CIRILLO, OLSZEWSKI, MONTEMURO, POPOVICH, JOHNSON, HUDOCK AND FORD ELLIOTT, JJ.

DISSENTING OPINION BY WIEAND, J.:

A majority of this Court, by its holding in this case, has made it possible to convict parents and rooming house owners of possession of controlled substances which have been concealed by a child or roomer in his or her bedroom even though the parent or owner has no knowledge of the presence of the controlled substance. I dissent. The doctrine of constructive possession

should not be expanded to make possible the conviction of persons who merely happen to be living in the same residence where drugs are found.

On January 23, 1989, police obtained a warrant to search a two story row house located at 181 Wishart Street, Philadelphia. The warrant was issued upon information obtained from a confidential informant that drug related activities were being conducted at that address by persons named "Zoraida" and "Flea". The affidavit recited also that police, on five separate occasions, had observed the delivery of small packages to the Wishart Street home by unidentified, Hispanic males. When police arrived to execute the warrant, they were admitted by appellant, who told police that the house was hers. Also present at the time of the search, according to police testimony, were a

Hispanic male in his mid-twenties, an elderly Hispanic male, a juvenile Hispanic male approximately seventeen years of age and several small children. During the search, police found in the rear bedroom on the second floor a metal box containing a large quantity of cocaine and items of drug paraphernalia. This box was found in a dresser drawer which also contained children's clothing. In the middle bedroom on the second floor, police discovered a tool box containing more than ten thousand ($10,000.00) dollars in cash. The box had been hidden under loose floorboards. Also found in the middle bedroom was a second tool box containing numerous items of drug paraphernalia.

The uncontradicted testimony was that the middle and rear bedrooms had been sublet by appellant to her sister

and brother-in-law, who were the persons named "Zoraida" and "Flea" in the affidavit for the search warrant. The testimony was that "Zoraida" and "Flea" had been renting these two bedrooms from appellant continuously after December, 1989, and had occupied the same their children. The trial court expressly accepted this testimony and found as a fact that the two rooms had been occupied by appellant's sister and brother-in-law.[1]

Despite these facts, the trial Court found appellant guilty. It did so, as it

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[1]. There was also testimony presented by the defense that the subtenants had installed locks on the doors to the rented bedrooms. However, the testimony of the police officers, who had participated in the search, established that the middle and rear bedrooms had not been locked at the time the house was searched. The officers were unable to recall whether or not the doors to these rooms had been equipped with locks.

stated in its opinion, because appellant was the primary tenant, because she was present at the time of the search, because the rooms in which the drugs were found were unlocked and because the persons suspected of drug activities were her relatives. The trial court's reasoning, more specifically, was as follows:

> In the non-jury trial of Maria Aviles, this Court learned that the defendant admitted possession and control of the premises, and that she was the only resident adult present when the house was searched that evening. While the defendant herself did not sleep in either of the rooms containing the contraband, it is also true that neither of those rooms was locked on the date of the search. In addition, the persons allegedly wanted by the police for previous drug sales, Zoraida and Flea, were relatives of defendant, as well as her tenants. Evidence adduced at trial showed that suspicious drug activity was observed at the premises by police in the days immediately prior to obtaining the search warrant.
>
> The cases cited by defendant in

> support of her position are all fact-specific, and thus not controlling in the case at bar. Maria Aviles was the lessee at the subject premises and she had access to all the bedrooms, none of which were locked. She permitted others to live in the house, and they happened to be her sister and brother-in-law. Ms. Aviles, therefore, must be presumed to be aware of the activities engaged in by her relatives/tenants when various males would visit the home for brief periods of time to make transactions. She must also be presumed to have known why floor boards were removed and then replaced after large sums of cash were hidden under the floor of the middle bedroom, right next to that of the defendant.

My own review of the record discloses no evidence whatsoever that the drugs found in the two subleased bedrooms belonged to appellant or even that she was aware of their presence. The drugs were not found in the living room or any other common area of the house, nor was there evidence to establish that appellant slept in, stored property in, or otherwise shared access to the two

bedrooms in which contraband was found. On the contrary, the uncontradicted testimony was that the two bedroom in which the contraband was found. On the contrary, the uncontradicted testimony was that the two bedrooms in which drugs, money and paraphernalia were found had been occupied by appellant's sister and brother-in-law. The contraband, moreover, was not in plain view where it could have been observed by the primary tenant but was concealed in a dresser drawer and beneath a floorboard in the subtenant's quarters.

The Commonwealth argues that it did not offer evidence that the rooms containing drugs had been sublet and that the trial court, therefore, was free to reject such testimony. This argument, however, ignores the fact that the Commonwealth had the burden of proving

beyond a reasonable doubt that the cocaine found by police was in the possession and control of appellant. The trial court's rejection of defense evidence would not have been a substitute for proof, and in no way would have relieved the Commonwealth from its burden of proving each and every element of the crime charged beyond a reasonable doubt. See: **COMMONWEALTH V. SCOTT**, 409 Pa. Super. 313, 319, 597 A2d 1220, 1223 (1991); **COMMONWEALTH V. PEDUZZI**, 338 Pa. Super. 551, 558, 488 A2d 29, 33 (1985). See also: **COMMONWEALTH V. GRAHAM**, 528 Pa. 250, 596 A2d 1117 (1991); **COMMONWEALTH V. CLINTON**, 391 Pa. 212, 137 A2d 463 (1958). In any event, it is patently clear that the evidence of such subletting and occupancy was not rejected but specifically accepted by the trial court acting as fact finder. An examination of

the record discloses that the prosecution was unable to present any affirmative evidence that appellant, rather than the occupants of the bedrooms, knew of the presence of the contraband and/or exercised control over the bedrooms in which it was found.[2] Moreover, even if the uncontradicted testimony in this case were to be rejected, there is no evidence of appellant's knowledge of the presence of contraband or control of the bedrooms in which contraband was found other than that she was the primary tenant of the property.

The Commonwealth, being unable to prove actual possession of contraband by

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2. There was no evidence at trial that Zoraida and Flea had advised suppliers about the time when processing would be complete or that a brick of cocaine had been cut by "the aforementioned persons...on a kitchen table." The only references to these incidents were attributed to the unnamed informant in the affidavit for search warrant.

appellant, relied on the doctrine of constructive possession. "If the Commonwealth is unable to prove that a suspect had a controlled substance on [her] person, the Commonwealth may show constructive possession of illicit drugs, and such may be demonstrated by showing that a defendant had power of control over and intended to exercise such control of [the] substance." **COMMONWEALTH V. DAVIS**, 331 Pa. Super. 285, 304, 480 A2d 1035, 1045 (1984). See also **COMMONWEALTH V. BRUNER**, 388 Pa. Super. 82, 98, 564 A2d 1277, 1284-1285 (1989); **COMMONWEALTH V. HARRIS**,263 Pa. Super. 110, 119-120, 397 A2d 424, 429 (1979). "'The purpose of the constructive possession doctrine is to expand the scope of possession statutes to encompass those cases where actual possession at the time of arrest cannot be shown but

where the inference that there has been actual possession is strong.'" **COMMONWEALTH V. CARROLL**, 510 Pa. 299, 302, 507 A2d 819, 820 (1986), quoting Whitebread and Stevens, **TO HAVE AND TO HAVE NOT**, 58 U.Va.L.Rev. 751, 755 (1972). See also: **COMMONWEALTH V. STEMBRIDGE**, 397 Pa. Super. 1, 4, 579 A2d 901, 903 (1990).

> Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of a contraband was more likely than not. We have defined constructive possession as "conscious dominion." **COMMONWEALTH V. DAVIS**, 444 Pa. 11, 15, 280 A2d 119, 121 (1971). We subsequently defined "conscious dominion" as "the power to control the contraband and the intent to exercise that control." **COMMONWEALTH MACOLINO**, 503 Pa. 201, 206, 469 A2d 132, 134 (1983). Though these tests may be helpful and logical in the abstract, application to actual factual situations, particularly when multiple actors are involved, has proven difficult for our lower courts in cases involving controlled substances located on premises in joint possession but not on the actual

person of any of the parties entitled to occupy those premises.

COMMONWEALTH V. MUDRICK, 510 Pa. 305, 308, 507 A2d 1212, 1213 (1986). See also: **COMMONWEALTH V. SANTIESTEBAN**, 381, Pa. Super. 18, 21-22, 552 A2d 1072, 1074 (1988); **COMMONWEALTH V. CRUZ-ORTEGA**, 372 Pa. Super. 389, 392-393, 539 A2d 849, 851 (1988).

Constructive possession may in some instances be inferred from the totality of the circumstances. **COMMONWEALTH V. FORTUNE**, 456 Pa. 365, 369, 318 A2d 327, 329 (1974). See also: **COMMONWEALTH V. MACOLINO**, 503 Pa. 201, 206, 469 A2d 132, 134 (1983); **COMMONWEALTH V. PARSONS**, 391 Pa. Super. 273, 284, 570 A2d 1328, 1334 (1990); **COMMONWEALTH V. KEEFER**, 338 Pa. Super. 184, 189, 487 A2d 915, 918 (1985). "An accused may be charged with the knowledge of the location of the contraband, which is essential to the

proof of an intent to exercise control, if the contraband is found in places peculiarly within the control of the accused." **COMMONWEALTH V. DECAMPLI**, 243 Pa. Super. 69, 75, 364 A2d 454, 456-457 (1976). See also: **COMMONWEALTH V. STAMPS**, 493 Pa. 530, 538-539, 427 A2d 141, 145 (1981); **COMMONWEALTH V. DIAZ**, 319 Pa. Super. 538, 539-540, 466 A2d 674, 675 (1983); **COMMONWEALTH V. THOMPSON ,** 286 Pa. Super. 31, 34-35, 428 A2d 223, 224 (1981). However, "where others have equal access to contraband, evidence of defendant's mere opportunity to control the contraband is insufficient to sustain a conviction [for] its possession." **COMMONWEALTH V. BANAHASKY**, 250 Pa. Super. 495, 499, 378 A2d 1257, 1259 (1977). See also: **COMMONWEALTH V. KLEBLITIS**, 500 Pa. 321, 324, 456 A2d 149, 151 (1983); **COMMONWEALTH V. CHENET**, 473 Pa. 181, 184-

185, 373 A2d 1107, 1108-1109 (1977); **COMMONWEALTH V. FORTUNE**, **supra** at 368-369, 318 A2d at 328-329; **COMMONWEALTH V. DAVIS**, 444 Pa. 11, 16, 280 A2d 119, 121 (1971); **COMMONWEALTH V. TIRPAK**, 441 Pa. 534, 272 A2d 476 (1971). "It is well settled that facts giving rise to mere 'association', 'suspicion' or 'conjecture' will not make out a case of constructive possession." **COMMONWEALTH V. VALETTE**, ___Pa.____, ___ A2d ____(J. 158/1992; filed September 18, 1992) (Slip opinion at p.7). Still, where the defendant is shown to have access to the contraband, "the Commonwealth may demonstrate constructive or joint constructive possession, from the totality of the circumstances, even though others may have access to the drugs." **COMMONWEALTH V. DAVIS**, **supra**., 331 Pa. Super. at 305, 480 A2d 1045

(emphasis deleted). Thus, in situations where more than one person has access to the contraband, the Supreme Court has held that "constructive possession may be found in either or both actors if contraband is found in an area of joint control and equal access." **COMMONWEALTH V. MUDRICK**, **supra**, at 309, 507 A2d 1214. In such cases, it is the "shared access to and control of the area where the contraband [is] found" which is critical to a finding of constructive possession. Id.

Under the circumstances of the instant case, I would hold that the Commonwealth failed to present sufficient evidence to establish beyond a reasonable doubt that appellant had joint control of and equal access to the drugs, case and paraphernalia found in the two bedrooms occupied by Zoraida and Flea. A close

examination of the cases interpreting the doctrine of constructive possession supports this view.

In **COMMONWEALTH V. MACOLINO, supra**, the Supreme Court observed that a bedroom is a more private place with limited access and is, therefore, usually subject to the exclusive control of its occupant. Id. at 207, 469 A2d at 135. See also: **COMMONWEALTH V. GILCHRIST**, 255 Pa. Super. 252, 255, 386 A2d 603, 605 (1978); **COMMONWEALTH V. DECAMPLI**, **supra** at 74-76, 364 A2d at 456-457. The **MACOLINO** Court held that a husband could be found to have been in constructive possession of drugs found in a bedroom closet which he shared with this wife. On the other hand, in **COMMONWEALTH V. HANNAN**, 229 Pa. Super. 540, 544-545, 331 A2d 503, 505 (1974), the Superior Court held that a husband could not be deemed in constructive

possession of drugs found in his wife's purse and dresser where there was no evidence that the husband had exercised control over or had any knowledge of the presence of drugs in his wife's personal belongings. The Court in **HANNAN** held further that the husband could not be deemed to be in constructive possession of marijuana which had been hidden in a drawer in the main bathroom of the house. The Court rejected the Commonwealth's position that the husband's ownership of the house and presence at the time of the search constituted sufficient evidence to permit a finding of constructive possession. The Court said:

> In this case, no drugs were found on the person of the appellant Mr. Hannan nor was there any evidence of knowledge of the presence of drugs in his home. Nine persons were present at the time of the search, all of whom were staying at the house varying lengths of time. A nurse, renting one of the bedrooms, was home for Christmas vacation.

> And, just four days before the search, twenty youths had attended a Christmas party at the Hannan house. Each and every individual could have had "equal access" to the drawer in the main bathroom... [T]he bag of marijuana was found secreted in a drawer amidst numerous items in a metal cabinet. It is sheer speculation and certainly not that quality of evidence that would be sufficient to convict beyond a reasonable doubt to presume that Mr. Hannan had either knowledge of or indeed, "possessed" the marijuana discovered by the police.

COMMONWEALTH V. HANNAN, supra at 546-547, 331 A2d at 506.[3]

In the instant case, there was no evidence that appellant had occupied or shared with others the two bedrooms where contraband was found. Rather, the evidence was that she had sublet those rooms to her sister and brother-in-law.

---

[3]. With respect to the wife, the **HANNAN** Court held that she could be found to be in constructive possession of drugs found in her purse and dresser, but not of marijuana found hidden in the main bedroom.

To permit a finding that she had constructive possession of drugs found in these two rooms would permit homeowners to be found criminally liable whenever a person who rented a room kept cocaine or other controlled substances in the room. It would permit parents to be found in constructive possession of drugs secreted by a son or daughter in his or her bedroom. It would permit a finding of constructive possession even where a homeowner had no knowledge of the presence of drugs. To allow such a result is to allow a finding of guilt based on pure speculation. It would expand the principle of constructive possession beyond the facts of all priors decisions. Moreover, it defies the application of logic to the facts. It is not reasonable in such cases to infer knowledge of the drugs by the owner or an intent by the

owner to exercise control over the contraband.

My conclusion is supported further by the decision in **COMMONWEALTH V. LUDDY**, 281 Pa. Super. 541, 547, 550, 422 A2d 601, 604-606 (1980), cert denied, 454 U.S. 825, 102 S.Ct. 114, 70 L.Ed. 2d 99 (1981), where evidence was held insufficient to establish that a mother had had constructive possession of marijuana found in the crisper compartment of a refrigerator. The evidence showed that she had been one of four adults living in the house and that no marijuana had been found in her bedroom or on her person. Finally, there was no evidence as to how long the marijuana had been in the refrigerator or who had put it there. A similar conclusion was reached by the Supreme Court in **COMMONWEALTH V. CHENET**, **supra**. In

that case, marijuana had been found in the living room and kitchen of the defendant's trailer. In reversing the defendant's conviction for possession of the marijuana, the Supreme Court held that possession of the contraband was not established where no drugs had been found in the defendant bedroom or on his person, but only in areas which were equally accessible to the defendant's roommate and the roommate's girlfriend. See also: **COMMONWEALTH V. FORTUNE**, **supra** at 369, 318 A2d at 329 ("We cannot assume that a resident of a home, where guests are present, knows of the full contents of the premises."). Compare: **COMMONWEALTH V. FROMETA** 398 Pa. Super. 110, 580 A2d 865 (1990) (tenant of multi-unit apartment building could not be found in constructive possession of drugs found in basement of building which was accessible

to other tenants in building).

The contraband in this case was not found in portions of the residence occupied jointly by those in residence. It was found concealed in bedrooms which had been sublet by the primary tenant and which were occupied by the subtenants. The fact that the subtenants were relatives of appellant and that the bedrooms were unlocked, in my judgement, was entirely insufficient to show that the appellant had knowledge of the concealed contraband or an intent to exercise conscious dominion over it. Actual possession under the circumstances established by the evidence in this case cannot be said to be more likely than not. The evidence was not of a quality which proved appellant's guilt beyond a reasonable doubt. Therefore, I would reverse the judgment of sentence of

discharge the appellant.

President Judge Rowley, Montemuro, Ford Elliott, JJ. Joins.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE
	:	SUPERIOR
	:	COURT OF
v.	:	PA
	:	
MARIA AVILES	:	NO. 1650
APPELLANT	:	PHL 1990

C.P. -Criminal,
Phila.,
(No. 89-02-1032-1033)

O R D E R

The court hereby grants the application filed January 27, 1992, requesting en banc reargument of the decision dated January 13, 1992.

The parties are directed to file their briefs in accordance with Pa.R.A.P. 2140 (each party shall, within the time period specified, either refile the brief previously filed together with a supplemental brief if desired, or prepare and file a substituted brief).

PER CURIAM

DATE: MARCH 12, 1991

COMMONWEALTH OF PENNSYLVANIA	:	IN THE
	:	SUPERIOR
V.	:	COURT OF
	:	PA
MARIA AVILES,	:	NO. 1650
APPELLANT	:	PHILA 1990

APPEAL FROM JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CRIMINAL DIVISION, OF PHILADELPHIA COUNTY, NOS. 89-02-1032-1033.

BEFORE: ROWLEY, P.J., CAVANAUGH AND WIEAND, JJ.

OPINION BY WIEAND, J.:

Maria Aviles was tried non-jury and was found guilty of possession of a controlled substance with the intent to deliver and possession of drug paraphernalia. Post-trial motions were denied, and she was sentenced to serve concurrent terms of imprisonment for not less than four (4) years nor more than eight (8) years for possession with intent to deliver and for not less than six (6) months nor more than one (1) year for possession of drug paraphernalia. On

direct appeal from the judgment of sentence, she argues that the evidence introduced at trial was insufficient to permit a finding that she was in possession of drugs and paraphernalia found in two rooms which she sublet to her sister and brother-in-law.

On January 23, 1989, police obtained a warrant to search a two story row house located at 181 Wishart Street, Philadelphia. The warrant was issued upon information obtained from a confidential informant that drug related activities were being conducted at that address by persons named "Zoraida" and "Flea". The affidavit recited also that police, on five separate occasions, had observed the delivery of small packages to the Wishart Street home by unidentified, Hispanic males. When police arrived to execute the warrant, they were admitted by appellant,

who told police that the house was hers. During the search, police found in the rear bedroom on the second floor a metal box containing a large quantity of cocaine and items of drug paraphernalia. This box was found in a dresser drawer which also contained children's clothing. In the middle bedroom on the second floor, police discovered a tool box containing more than ten thousand ($10,000.00) dollars in cash. The box had been hidden under loose floorboards. Also found in the middle bedroom was a second tool box containing numerous items of drug paraphernalia. In the dining room, on the first floor of the house, police discovered correspondence and a gas bill addressed to appellant.

The trial court accepted the uncontradicted testimony that the middle and rear bedrooms had been sublet by

appellant to her sister and brother-in-law, who were the persons named "Zoraida" and "Flea" in the affidavit for search warrant. This testimony was that "Zoraida" and "Flea", along with their children, had been renting these two bedrooms from appellant continuously after December, 1988, and that they had installed locks on the doors of their rooms. The testimony of police officers, who had participated in the search, established that the middle and rear bedrooms had not been locked at the time appellant's house was searched, but the officers were unable to recall whether or not the doors to the rooms had been equipped with locks.

The trial court held that appellant could be found guilty because she was the primary tenant, because she was present at the time of the search, because the

rooms in which the drugs were found had not been locked, and because the persons suspected of dealing drugs were her relatives. The issue before this Court is whether such facts are sufficient to prove possession of the drugs found in the rooms which had been sublet to appellant's relatives.

In reviewing a challenge to the sufficiency of the evidence, we must determine "whether, viewing all the evidence admitted at trial, together with all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the trier of fact could have found that each element of the offenses charged was supported by evidence and inferences sufficient in law to prove guilt beyond a reasonable doubt." **COMMONWEALTH V. JACKSON**, 506 Pa. 469, 472-473, 485 A2d 1102, 1103 (1984).

See also: **COMMONWEALTH V. BRADY**, 385 Pa. Super. 279, 282, 560 A2d 802, 804 (1989); **COMMONWEALTH V. SABHARWAL**, 373 Pa. Super. 241, 243, 540 A2d 957, 958 (1988). "This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long was the combination of the evidence links the accused to the crime beyond a reasonable doubt." **COMMONWEALTH V. HARDCASTLE**, 519 Pa. 236, 246, 546 A2d 1101, 1105 (1988), **cert denied**, ___U.S.___, 110 S.Ct. 1169, 107 L.Ed. 2d 1072 (1990). See also: **COMMONWEALTH V. PETRISKO**, 442 Pa. 575, 579-580, 275 A2d 46 (1971); **COMMONWEALTH V. AKERS** 392 Pa. Super. 170, 181, 572 A2d 746, 751 (1990). The facts and circumstances established by the Commonwealth "need not be absolutely incompatible with the defendant's innocence, but the question of any doubt

is for the [factfinder] unless the evidence 'be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances.'" **COMMONWEALTH V. SULLIVAN**, 472 Pa. 129, 150, 371 A2d 468, 478 (1977), quoting **COMMONWEALTH V. LIBONATI**, 346 Pa. 504, 508, 31 A2d 95, 97 (1943). However, even though "reasonable inference must be drawn in the Commonwealth's favor, the inferences must flow from facts and circumstances proven in the record, and must be of 'such volume and quality as to overcome the presumption of innocence and satisfy the [factfinder] of the accused's guilt beyond a reasonable doubt.'" **COMMONWEALTH V. SCOTT,** ___Pa. Super.___, ___, 597 A2d 1220, 1221 (1991), quoting **COMMONWEALTH V. CLINTON**, 391 Pa. 212, 219, 137 A2d 463, 466 (1958). "The trier of fact

cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fall even under the limited scrutiny of appellate review." **COMMONWEALTH V. SCOTT**, **supra** at ___, 597 A2d at 1221. See also: **COMMONWEALTH V. ROSCIOLI**, 454 Pa. 59, 309 A2d 396 (1973); **COMMONWEALTH V. GARRETT**, 423 Pa. 8, 12, 222 A2d 902, 905 (1966).

"If the Commonwealth is unable to prove that a suspect had a controlled substances on [her] person, the Commonwealth may show constructive possession of illicit drugs, and such may be demonstrated by showing that a defendant had power of control over and intended to exercise such control of [the] substance." **COMMONWEALTH V. DAVIS**, 331 Pa. Super. 285, 304, 480 A2d 1035, 1045 (1984). See also: **COMMONWEALTH V. BRUNER**, 388 Pa. Super. 82, 98, 564 A2d

1277, 1284 (1989); **COMMONWEALTH V. HARRIS**, 263 Pa. Super, 110, 119-120, 397 A2d 424, 429 (1979). "'The purpose of the constructive possession doctrine is to expand the scope of possession statutes to encompass those cases where actual possession at the time of arrest cannot be shown but where the inference that there has been actual possession is strong.'" **COMMONWEALTH V. CARROLL**, 510 Pa. 299, 302, 507 A2d 819, 820 (1986), quoting Whitebread and Stevens, **TO HAVE AND TO HAVE NOT**, 58 U.Va.L.Rev. 751, 755 (1972). See also: **COMMONWEALTH V. STEMBRIDGE**, 397 Pa. Super. 1, 4, 579 A2d 901, 903 (1990).

> Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as "conscious dominion." **COMMONWEALTH**

> **V. DAVIS**, 444 Pa. 11, 15, 280 A2d 119, 121 (1971). We subsequently defined "conscious dominion" as "the power to control the contraband and the intent to exercise that control." **COMMONWEALTH V. MACOLINO**, 503 Pa. 201, 206, 469 A2d 132, 134 (1983). Though these tests may be helpful and logical in the abstract, application to actual factual situations, particularly when multiple actors are involved, has proven difficult for our lower courts in cases involving controlled substances located on premises in joint possession but not on the actual person of any of the parties entitled to occupy those premises.

COMMONWEALTH V. MUDRICK, 510 Pa. 305, 308, 507 A2d 1212, 1213 (1986). See also: **COMMONWEALTH C. SANTIESTEBAN**, 381 Pa. Super. 18, 21-22, 552 A2d 1072, 1074 (1988); **COMMONWEALTH V. CRUZ ORTEGA**, 372 Pa. Super. 389, 392, 539 A2d 849, 851 (1988).

Constructive possession may in some instances be inferred from the totality of the circumstances. **COMMONWEALTH V. FORTUNE**, 456 Pa. 356, 369, 318 A2d 327,

329 (1974). See also: **COMMONWEALTH V. MACOLINO**, 503 Pa. 201, 206, 469 A2d 132, 134 (1983); **COMMONWEALTH V. PARSONS**, 391 Pa. Super. 273, 284, 570 A2d 1328, 1334 (1990); **COMMONWEALTH V. KEEFER**, 338 Pa. Super. 184, 189, 487 A2d 915, 918 (1985). "An accused may be charged with the knowledge of location of the contraband, which is essential to the proof of an intent to exercise control, if the contraband is found in places peculiarly within the control of the accused." **COMMONWEALTH V. DECAMPLI**, 243 Pa. Super. 69, 75, 364 A2d 454, 456-457 (1976). See also: **COMMONWEALTH V. STAMPS**, 493 Pa. 530, 538-539, 427 A2d 141, 145 (1981); **COMMONWEALTH V. DIAZ**, 319 Pa. Super. 538, 539-540, 466 A2d 674, 675 (1983); **COMMONWEALTH V. THOMPSON**, 286 Pa. Super. 31, 34-35, 428 A2d 223, 224 (1981). However, "where others have equal access

to contraband, evidence of defendant's mere opportunity to control the contraband is insufficient to sustain a conviction [for] its possession." **COMMONWEALTH V. BANAHASKY**, 250 Pa. Super. 495, 499, 378 A2d 1257, 1259 (1977). See also: **COMMONWEALTH V. KEBLITIS**, 500 Pa. 321, 324, 456 A2d 149, 151 (1983); **COMMONWEALTH V. CHENET**, 473 Pa. 181, 184-185, 373 A2d 1107, 1108-1109 (1977); **COMMONWEALTH V. FORTUNE**, **supra** at 368-369, 318 A2d 328-329; **COMMONWEALTH V. DAVIS**, 444 Pa. 11, 16, 280 A2d 119, 121 (1971); **COMMONWEALTH V. TIRPAK**, 441 Pa. 534, 272 A2d 476 (1971). Still, where the defendant is shown to have access to the contraband, "the Commonwealth may demonstrate constructive or joint constructive possession from the totality of the circumstances, even though others may have had access to the drugs."

COMMONWEALTH V. DAVIS, **supra**, at 305, 480 A2d at 1045 (emphasis deleted). Thus, in situations where more than one person has access to the contraband, the Supreme Court has held that "constructive possession may be found in either or both actors if contraband is found in an area of joint control and equal access." **COMMONWEALTH V. MUDRICK**, **supra** at 309, 507 A2d at 1214.

In the instant case, the Commonwealth failed to present sufficient evidence to establish beyond a reasonable doubt that appellant had joint control of and equal access to the two bedrooms in which the police found drugs and paraphernalia. Our review of the record discloses no evidence whatsoever that the drugs found in the rented bedrooms belonged to appellant or, indeed, that she was aware of their presence. The

drugs were not found in the living room or any other common area of the house, nor was there evidence to establish that appellant slept in, stored property in, or otherwise shared access to the two bedrooms in which the contraband was found. On the contrary, the uncontradicted testimony was that the two bedrooms in which the drugs and paraphernalia were found had been occupied by appellant's sister and brother-in-law. These rooms, according to the evidence, were subject to the control of the tenant-occupant and not their lessor. The contraband, moreover, was not in plain view where it could have been observed by the primary tenant but was carefully concealed in a dresser drawer and beneath a floorboard in the subtenant's quarters.

In **COMMONWEALTH V. MACOLINO**, **supra**,

the Supreme Court observed that "a bedroom is a 'more private place with limited access and usually subject to the exclusive control of the owner or lessee of the premises.'" Id. at 207, 469 A2d at 135 quoting **COMMONWEALTH V. GILCHRIST**, 255 Pa. Super. 252, 255, 386 A2d 603, 605 (1978). The **MACOLINO** Court held that a husband could be found to have been in constructive possession of drugs found in a bedroom closet which he shared with his wife. On the other hand, in **COMMONWEALTH V. HANNAN**, 229 Pa. Super. 540, 544-545, 331 A2d 503, 505 (1974), the Superior Court held that a husband could not be deemed in constructive possession of drugs found in his wife's purse and dresser where there no evidence that the husband had exercised control over or had any knowledge of the presence of drugs in his wife's personal belongings. The Court

in **HANNAN** held further that the husband could not be deemed to be in constructive possession of marijuana which had been hidden in a drawer in the main bathroom of the house. The Court rejected the Commonwealth's position that the husband's ownership of the house and presence at the time of the search constituted sufficient evidence to permit a finding of constructive possession. The Court said:

> In this case, no drugs were found on the person of the appellant Mr. Hannan nor was there any evidence of knowledge of the presence of drugs in home. Nine persons were present at the time of the search, all of whom were staying at the house for varying lengths of time. A nurse, renting one of the bedrooms, was home for Christmas vacation. And, just four days before the search, twenty youths had attended a Christmas party at the Hannan house. Each and every individual could have had "equal access" to the drawer in the main bathroom... [T]he bag of marijuana was found secreted in a drawer amidst numerous items in a metal cabinet. It is sheer speculation and

> certainly not that quality of evidence that would be sufficient to convict beyond a reasonable doubt to presume that Mr. Hannan had either knowledge of or indeed, "possessed" the marijuana discovered by the police.

COMMONWEALTH V. HANNAN, **supra** at 546-547, 331 A2d at 506.[1]

In the instant case, appellant did not occupy or share with others the two bedrooms where contraband was found. Rather, she had sublet those rooms to her sister and brother-in-law. To permit a finding of constructive possession under these circumstances would permit homeowners to be found criminally liable whenever a person who rented a room kept cocaine or other controlled substances in the room. It would permit parents to be

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[1]. With respect to the wife, the **HANNAN** Court held that she could be found to be in constructive possession of drugs found in her purse and dresser, but not of marijuana found hidden in the main bathroom.

found in constructive possession of drugs kept by a son or daughter in his or her bedroom. It would permit a finding of constructive possession even where a homeowner had no knowledge of the presence of drugs. To allow such a result would be to expand the principle of constructive possession beyond the facts of all prior decisions. Moreover, it would defy the application of logic to the facts. It is not reasonable in such cases to infer knowledge of the drugs by the owner or an intent to control the contraband.

Our reasoning is also supported by the decision in **COMMONWEALTH V. LUDDY**, 218 Pa. Super. 541, 547-550, 422 A2d 601, 604-606 (1980), **cert denied**, 454 U.S. 825, 102 S.Ct. 114, 70, L.Ed. 2d 99 (1981), where the evidence was held insufficient to establish that a mother

had had constructive possession of marijuana found in the crisper compartment of a refrigerator. The evidence showed that she had been one of four adults living in the house and that no marijuana had been found in her bedroom or on her person. Finally, there was no evidence as to how long the marijuana had been in the refrigerator or who had put it there. A similar conclusion was reached by the Supreme Court in **COMMONWEALTH V. CHENET**, **supra**. In that case, marijuana had been found in the living room and kitchen of the defendant's trailer and in the area immediately outside the trailer. In reversing the defendant's conviction for possession of the marijuana, the Supreme Court held that possession of the contraband was not established where no drugs had been found in the defendant's

bedroom or on his person, but only in areas which were equally accessible to the defendant's roommate and the roommate's girlfriend. See also, **COMMONWEALTH V. FORTUNE**, **supra** at 369, 318 A2d at 329 ("We cannot assume that a resident of a home, where guests are present, knows of the full contents of the premises."). Compare: **COMMONWEALTH V. FROMETA**, 398 Pa. Super. 110, 580 A2d 865 (1990) (tenant of multi-unit apartment building could not be found in constructive possession of drugs found in basement of building which was presumably accessible to other tenants in building).

Because the evidence in this case was insufficient to prove constructive possession of drugs by appellant, we reverse the judgement of sentence and order appellant discharged.

CAVANAUGH, J. dissents.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY TRIAL DIVISION - CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	**FEBRUARY TERM, 1989**
	:	**NOS. 1032,**
VS.	:	**1033**
	:	
	:	
MARIA AVILES	:	**SUPERIOR COURT NO. 1650 PHILA. 1990**

OPINION

JACKSON, J.

PROCEDURAL HISTORY

The defendant, Maria Aviles, was tried before this Court on December 13, 1989 and was found guilty at that time of both felony and misdemeanor drug possession. Post-Verdict Motions were filed on December 26, 1989, and Supplemental Post-Verdict Motions were filed, with permission, on May 10, 1990. All Post-Verdict Motions were denied on

May 10, 1990, and the defendant was sentenced at that time to the mandatory minimum sentence required by law for the amount possessed, to wit, a total of four (4) to eight (8) years. Defendant requested a stay of sentence pending appeal, which was granted. A timely Appeal was filed in the Superior Court, and the defendant remains free on bail pending the disposition of that Appeal.

FACTUAL HISTORY

On January 23, 1989, Philadelphia Police executed a search warrant at 181 W. Wishart Street in Philadelphia t about 7:3- p.m. They were met at the door by the defendant, who said, "This is my place." In the drawer of a dresser, in the back bedroom on the second floor, was a metal box filled with a quantity of narcotics. In the middle bedroom, under the floor boards, police found another

box and in contained $10,538.00, plus drug paraphernalia.

The defense presented character evidence and testimony indicating that the rooms containing contraband were rented from defendant by "Zoraida and Flea", the sister and brother-in-law of defendant. Defendant denied any knowledge of the contraband.

LEGAL ISSUES

1. The Commonwealth failed to produce sufficient evidence to prove defendant's constructive possession of the contraband seized since that contraband was not in an area to which she had joint control and equal access. Moreover, there was insufficient evidence showing she had conscious dominion over the contraband, and that she had the power to control same and the intent to exercise that control.

2. The verdict was against the weight of the evidence for the same

reasons cited in paragraph (1).

These issues will be dealt with together since they involve the exact same facts and law. Defendant correctly identifies the significant issue in this case as being whether or not he has been proven beyond a reasonable doubt to have been in constructive possession of the narcotics and associate contraband at the time of the search. The cases on constructive possession require a finding that defendant has the power to control the contraband and the intent to exercise that control, especially if the material is located in an area of equal access and/or joint control. See **COMMONWEALTH V. MACOLINO**, **503 Pa. 201, 469 A.2d 132 (1983)**. Each such case must turn on an examination of the totality of the circumstance presented to the finder of fact.

In the non-jury trial of Maria Aviles, this Court learned that the defendant admitted possession and control of the premises, and that she was the only resident adult present when the house was searched that evening. While the defendant herself did not sleep in either of the rooms containing the contraband, it is also true that neither of those rooms was locked on the date of the search. In addition, the persons allegedly wanted by the police for previous drug sales, Zoraida and Flea, were relatives of defendant, as well as her tenants. Evidence adduced at trial showed that suspicious drug activity was observed at the premises by police in the days immediately prior to obtaining the search warrant.

The cases cited by defendant in support of her position are all fact-

specific, and thus not controlling in the case at bar. Maria Aviles was the lessee at the subject premises and she had access to all the bedrooms, none of which were locked. She permitted others to live in the house, and they happened to be her sister and brother-in-law. Ms. Aviles, therefore, must be presumed to be aware of the activities engaged in by her relatives/tenants when various males would visit the home for brief period of time to make transactions. She must also be presumed to have known why floor boards were removed and then replaced after large sums of cash were hidden under the floor of the middle bedroom, right next to that of the defendant.

Our courts have upheld the conviction of a defendant on the theory of constructive possession where narcotics were discovered in the trunk of

an inoperable automobile stored on blocks in the driveway of the defendant's home. **COMMONWEALTH V. GRAY, 322 Pa. Super. 37, 469 A.2d 169 (1983).** If that conviction was affirmed, then surely the instant one must be, since here the evidence was found inside the defendant's home, in unlocked bedrooms. Constructive possession must be decided after viewing all the surrounding circumstances and determining from the specific set of facts that possession was more likely than not. **COMMONWEALTH V. MUDRICK, 510 Pa. 305, 507 A.2d 1212 (1986); COMMONWEALTH V. KEEFER, 338 Pa. Super. 184, 487 A.2d 915 (1985).** In this case, the Court is satisfied that those legal requirements have been met by the Commonwealth.

3. The trial court erred in excluding evidence from the search warrant and as to the events leading up

> to same, regard one Zoraida (sic) and Flea, whom the defense alleged were the actual possessors of the contraband and which evidence would have demonstrated that the defendant was not the possessor of the drugs.

Defendant's argument on this point is moot because the exact evidence barred earlier in the trial was subsequently allowed in by the Court during the defendant's case in chief. See Notes of Testimony of December 13, 1989, pages 102 and 122. In addition, defendant moved the search warrant into evidence without objection, so all evidence contained within the four corners of the warrant was before the trier of fact. The Court was, therefore, well aware of the defense arguments and evidence concerning Zoraida and Flea, and took them into consideration before reaching a verdict.

This Court, therefore, believes that

the Post-Verdict Motions filed were properly denied, and requests that the Judgement of Sentenced be affirmed.

BY THE COURT:

_____

J.

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA	:
V.	:
MARIA AVILES	:
	:

CERTIFICATE OF SERVICE

I, Peter C. Bowers, Esquire, have served a copy of Petition for Writ of Certiorari by first class mail to the following:

Appeals Unit
Office of the District Attorney
1421 Arch Street
Phila., PA 19102

Peter Bowers, Esquire

Date: 6/7/94